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BY E-FILING (cover letter only)
& BY HAND (cover letter and enclosure)

The Honorable Joseph J. Farnan, Jr.
United States District Court
844 King Street
Wilmington, DE 19801

PUBLIC VERSION

Re: Affymetrix, Inc. v. Illumina Inc., C.A. No. 04-CV-901 JJF

Dear Judge Farnan:

For the Court's *in camera* review, enclosed is a copy of the inadvertently produced Affymetrix document that was the subject of discussion at the pretrial conference last week. The document is an email chain between Phil McGarrigle (Affymetrix's chief patent counsel) and other Affymetrix employees regarding patent prosecution strategy and is thus privileged.¹ *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 806 (Fed. Cir. 2000) ("It is enough that the overall tenor of the document indicates that it is a request for legal advice or services. Moreover, it is not necessary to expressly request confidential legal assistance when that request is implied.").

Respectfully,

/s/ Maryellen Noreika

Maryellen Noreika (#3208)

Enclosure (document for *in camera* review)

cc: Dr. Peter T. Dalleo, Clerk (By Hand w/o enclosure)
Richard K. Herrmann, Esquire (By Hand w/o enclosure)
Marcus E. Sernel, Esquire (By Fax w/o enclosure)

¹ The document is also irrelevant to the infringement and damages issues to be tried in phase I of this case. As this Court has previously held, "[i]t is not improper for a patent applicant to broaden his claims during prosecution based on information that the applicant's attorney has learned about during the prosecution of a patent application, as long as the disclosure supports the broadened claims." *Lucent Extreme Techs., Inc. v. Extreme Networks, Inc.*, 367 F. Supp. 2d 649, 655 (D. Del. 2005). "Any such amendment or insertion must comply with all statutes and regulations, of course, but, if it does, its genesis in the marketplace is simply irrelevant" *Kingsdown Medical Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 874 (Fed.Cir.1988).